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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 178

EMMETT HORTON,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

JOE H. TONAHILL
P. O. Box 179
Jasper, Texas

WILLIAM VANDERCREEK
3315 Daniels
Dallas 5, Texas

Attorneys for Petitioner

FLOYD W. ADDINGTON
Of Counsel

December, 1960

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Opinions Below

The District Court's Memorandum Decision (Record, pp. 36-38) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (Record, pp. 40-48) is reported at 275 F.2d 148.

Jurisdiction

The judgment of the Court of Appeals was entered February 22, 1960 (Record, p. 48). A petition for rehearing

was timely filed on March 14, 1960, and was denied on April 8, 1960 (Record, p. 48). The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari were filed May 16, 1960, and granted by order of this Court on October 10, 1960 (Record, p. 49). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. The first question presented is whether in a diversity action to set aside a state workmen's compensation award the federal jurisdictional amount must be determined and controlled by state law instead of federal law.

2. The second question presented is whether the jurisdictional amount is present in a diversity action brought by Respondent-insurer to set aside state workmen's compensation board's award of only $1,050.00 in favor of Petitioner-employee.

3. The third question possibly presented is whether the jurisdictional amount is present in a diversity action where plaintiff's claim is below the jurisdictional amount because the defendant, expressly subject to a prior motion to dismiss for want of jurisdiction, conditionally files a compulsory counterclaim in excess of the jurisdictional amount.

4. The fourth question presented is whether an appeal by an insurer from a Texas Industrial Accident Board's award in favor of an injured employee constitutes an original action within the federal district court's jurisdiction.

Statutes Involved

28 U.S.C. §1332 (in relevant part):

"§1332. Diversity of Citizenship; amount in controversy; costs.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between . . ."

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

28 U.S.C. §1445 (in relevant part):

"§1445. Non removable actions

* * * * * *

"(c) A civil action in any State court arising under the workmen's compensation laws of such state may not be removed to any district court of the United States."

Federal Rule Civil Procedure 12(b) (in relevant part):

"(b) How Presented. . . . No defense or objection is waived by being joinded with one or more other defenses or objections in a responsive pleading or motion."

Texas Civil Statutes (Vernon, 1948, Supp. 1958):

Art. 8307, 8307a, 8307b (set out in relevant part, Appendix, pp. 11a-17a).

Statement

Respondent compensation insurer brought this suit in the United States District Court for the Eastern District of Texas praying that an $1,050.00 award entered in favor of the Petitioner by the Texas Industrial Accident Board be set aside (Record, pp. 1-4). Jurisdiction was claimed under diversity of citizenship and amount in controversy. 28 U.S.C. §1332. Petitioner, an injured employee of an employer covered by the Texas workmen's compensation law, had filed a claim before the Industrial Accident Board for the maximum compensation allowable under the Texas Act ($35.00 a week for 401 weeks—$14,035.00). This proceeding culminated in the $1,050.00 award.[1]

Petitioner moved to dismiss Respondent's suit to set aside the $1,050.00 award for want of jurisdictional amount; and then, expressly subject to the motion to dismiss, filed a compulsory counterclaim seeking the maximum compensation (Record, pp. 5, 11, 14). The district court in its memorandum opinion approved the extensive discussion of the identical problem in *National Surety Corp.* v. *Chamberlain*, 171 F.Supp. 591 (N.D. Tex. 1959), and dismissed the plaintiff-respondent's claim for want of federal jurisdiction; and noting that the counterclaim had been expressly conditioned on the motion to dismiss, ordered the entire suit dismissed (Record, pp. 36-38). On appeal the Fifth Circuit reversed and remanded, holding the matter

[1] The Respondent-insurer's previous compromise settlement agreement of $230.00 was set aside for *fraud*. *Emmett Horton* v. *Liberty Mutual Insurance Company*, No. 11,986, in the District Court of Orange County, Texas (1959), (Record p. 35).

in controversy was the amount claimed by the employee before the compensation board and not the amount of the award ($1,050.00) plaintiff-respondent sought to set aside by this suit. The court held that in workmen's compensation cases Texas law controls the determination of the amount in controversy for the federal district court. The court, without mentioning that the counterclaim in this case was filed subject to the motion to dismiss, further stated that jurisdictional amount can be satisfied by filing a compulsory counterclaim in excess of the minimum amount. The court also held that this suit by the insurer to set aside the administrative award constituted an original civil action (Record, pp. 40-48).

Summary of Argument

The decision below should be reversed because it is directly contrary to the intent of Congress to limit federal diversity jurisdiction by increasing the jurisdictional amount (Sen. Rep. No. 1830, 85th Cong., 2d Sess. 3, 10, 14, 21, 26-27 (1958)); and indirectly contrary to the intent of Congress to give the employee the conclusive choice of forums by prohibiting the removal of workmen's compensation cases (Sen. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958)). This incorrect result was reached by applying state law instead of federal law in determining the amount in controversy under 28 U.S.C. §1332. Indisputably federal law must be applied. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100.

Not only is the state test for determining jurisdictional amount contrary to the federal test, but also the very reasons which underlie the state test are contrary to the reasons which underlie the federal test.

Under the federal test the amount in controversy is determined from the plaintiff's cause of action, which in

this case is the right to set aside a $1,050.00 award. *Vance* v. *W. A. Vandercook Co.*, No. 2, 170 U.S 468; *Elgin* v. *Marshall*, 106 U.S. 578; *St. Paul Mercury Indem.* v. *Red Cab Co.*, 303 U.S. 283.

Under the state test, in an action by a compensation-insurer, the amount in controversy is not keyed to the plaintiff-insurer's cause of action to set aside the award. Instead the amount in controversy is keyed to the maximum potential claim that could be asserted by the employee-defendant—the amount the employee claimed before the Board. *Booth* v. *Texas Employers' Ins. Ass'n*, 132 Tex. 237, 251, 123 S.W.2d 322, 330.

Federal courts are courts of limited jurisdiction. The purpose of the federal jurisdictional amount is to further reduce the number of cases which can be brought in the national courts. State courts are courts of general jurisdiction. The purpose of the Texas jurisdictional amount requirement is to allocate cases among the three sets of trial courts.

The result of the decision below will be to erroneously place upon the already overcrowded dockets of the federal courts in Texas approximately 1100 diversity cases a year which, under the federal test, involve less than $10,000.

Petitioner's counterclaim may not be used to satisfy the jurisdictional amount requirement because it was filed expressly subject to a motion to dismiss Respondent's suit. Federal Rule of Civil Procedure 12b; 1 Moore's Federal Practice, ¶0.93 [5. -3], 859-60 (2d ed. 1960).

Moreover, if this suit is to review the amount Petitioner-employee claimed before the Board, and thus is not an independent and original civil action, federal jurisdiction fails. Federal district courts have no appellate-administrative jurisdiction. *Chicago R.I. & P. RR. Co.* v. *Stude*, 346 U.S. 574.

ARGUMENT

I.

In Diversity Action To Set Aside State Workmen's Compensation Award Federal Law Must Be Applied In Determining Whether Federal Jurisdiction Exists.

Federal jurisdiction of this suit to set aside the Texas Industrial Accident Board's $1,050.00 award is predicated upon diversity jurisdiction. The Questions Presented concern two of the requisites required under 28 U.S.C. §1332; that the *amount in controversy* must exceed $10,000, exclusive of interest and costs, and that the suit must be an *original civil action.*

Applying federal law the district court dismissed the present case for want of federal jurisdiction (Record, pp. 36-38). The Fifth Circuit reversed, holding that *state* law controls in determining the *federal* jurisdictional amount in Texas workmen's compensation suits. The court stated:

> "On motion by Horton to dismiss the suit for want of jurisdiction, the district judge turned his face away from the controlling decision of the Texas Supreme Court and from the many decisions of this court, declaring that Federal Court Jurisdiction in Texas Workmen's Compensation suits is a special jurisdiction and, in exercising it, the court is bound by, and must strictly follow, the construction placed on the statutes by the state courts (Record, p. 41).
>
> ". . . after the Supreme Court of Texas had in 1938, in the Booth case, dealt specifically, completely, and authoritatively with the matter of trial court jurisdiction of suits to set aside orders of the Board, this

court . . . declared and followed the rule for determining jurisdiction laid down by the Supreme Court of Texas in the Booth case" (Record, p. 44).

With deference to the court below, federal law, not state law, is to be used in determining the meaning of a federal jurisdictional statute. This very point was before this Court in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104: "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." Accord: *Chicago R.I. & P. RR. Co.* v. *Stude*, 346 U.S. 574, 580 (in diversity action federal law governs application and meaning of jurisdictional statute). As Mr. Justice Reed observed in his dissenting opinion in *Angel* v. *Bullington*, 330 U.S. 183, 198: "In matters of procedure and jurisdiction, I take it, no one would contend that the doctrine of Erie Railroad is applicable. One may regret that the line of the Great Divide between substance and procedure cannot be clearly marked so that all may agree as to its location in any one case. But that line exists." There should be no difficulty in drawing the line in this case.

There are perhaps few propositions as well established as the rule under present discussion. Federal law must determine questions of federal jurisdiction because such jurisdiction depends upon federal statutes and the Federal Constitution. We are not here concerned with the application of substantive rights created under the state remedy, but rather with the more fundamental question of whether Congress has given the federal district court jurisdiction to adjudicate this state-created remedy.

The basic error of the Fifth Circuit was to rely upon the Texas decision in *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 322 (1938), in de-

termining the amount in controversy for purposes of 28 U.S.C. §1332. This error pervades the rationale of the entire decision below, as is reflected by the stinging rebuke administered to the trial judge for "turn[ing] his face away from the controlling decisions of the Texas Supreme Court" (Record, p. 41).

In the paragraphs that follow Petitioner points out the difference between the state rule and the federal rule; and also the difference in the underlying principles of the two rules.

II.

Congressional Intent In Increasing The Jurisdictional Amount And In Prohibiting Removal Is Expressly Opposed To Exercising Federal Jurisdiction In This Case.

a. *Jurisdictional Amount*

As this Court well knows, federal district court jurisdiction is derived from Article III of the Constitution, but since Article III is not self-executing there is no jurisdiction save what Congress has chosen to allow. *Cary* v. *Curtiss*, 3 How. 236, 245; see Sen. Rep. No. 1830, 85th Cong., 2d Sess. 35 (1958), (Appendix, pp. 2a-3a). And traditionally this Court has narrowly construed the statutory grant of federal jurisdiction. *Healy* v. *Ratta*, 292 U.S. 263, 270: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." In the great case of *Strawbridge* v. *Curtiss*, 3 Cranch 267, this Court held that perfect diversity instead of minimal diversity was required under the diversity statute.

Now consider the relationship between the purpose for jurisdictional amount in federal courts and the purpose

in state courts. Article III contains no mention of jurisdictional amount; the amount requirement was added by Congress to limit federal jurisdiction and for this very purpose Congress in 1958 raised the amount required from $3,000 plus to $10,000 plus. 28 U.S.C. 1332, Act of July 25, 1958, Pub. L. 85-554, §2, 72 Stat. 415; see Sen. Rep. No. 1830, 85th Cong., 2d Sess. 3-4, 14-15, 21-24 (1958). Contrawise state courts, which are vested with general jurisdiction, employ the jurisdiction amount device to allocate cases among the various categories of state trial courts. This is well illustrated by the Texas decision that the court below relied upon, *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 322 (1938) (for purpose of Texas jurisdictional statute the amount in controversy in *insurer's* suit to set aside the Industrial Accident Board's award is the amount claimed by the employee before the Board and not the amount of the Board's award).

The reasons which underlie the *Booth* decision are not applicable to the federal jurisdictional statute. Texas has three trial courts: Justice of the Peace, with maximum jurisdictional amount of $200 (six-man jury determines the law and fact—appeals *de novo* to county court); County Courts with minimum jurisdictional amount of $200 and maximum of $1,000 (six-man jury); District Courts with minimum jurisdictional amount of $500 and no maximum amount (twelve-man jury). If the Texas courts in actions brought by compensation-insurers had not adopted a test based upon the maximum amount of the defendant's potential counterclaim, two suits in two courts could result. To illustrate: assume employee claimed $3,000 before the Board and the Board awarded $400. If the insurer's action was brought in the County Court and the defendant-employee wished to counterclaim for more than $1,000, the employee would have to instigate a separate suit in the State District Court. *Booth* v. *Texas Employers' Insurance*

Association, 132 Tex. 237, 251, 123 S.W.2d 322, 330 (1938). Under this Texas case if the employee-defendant does not wish to claim more than the Board's award, he need not counterclaim at all. Thus, it is of considerable significance that the amount claimed before the Board *only* applies in suits brought by the *insurer*. If the employee brings an action to set aside the Board's award and to recover compensation, the amount in controversy is governed by the amount claimed in his court petition—not the amount he claimed before the Board. For, although the employee may not claim more in court than he did before the Board, he can claim less. *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 246, 123 S.W.2d 322, 327-8 (1958) (on above point the opinion below, Record, p. 43, misstates *Booth*).

The Texas rule is based on principles of sound judicial administration in allocation of cases among the trial courts. In the federal system, where jurisdictional amount is used to restrict federal jurisdiction, the principles of sound judicial administration require a different result. Even the cost penalty provision of 28 U.S.C. §1332(b), set out page 3, *supra*, would be of doubtful application to the workmen's compensation suits brought by the insurer. See *National Surety Corp.* v. *Chamberlain*, 171 F. Supp. 591, 594 (N.D. Tex. 1959).

b. *Workmen's Compensation*

Along with increasing the jurisdictional amount Congress in 1958 prohibited the removal of state workmen's compensation suits (28 U.S.C. §1445(c), Act of July 25, 1958, Pub. L. 85-554, §5, 72 Stat. 415). This provision carried out the general purpose to limit federal jurisdiction and to ease what is perhaps the number one problem facing our federal court system; delay due to congestion of the trial dockets. Over 1000 workmen's compensation cases a year were being removed from Texas courts to federal district courts. Sen. Rep. No. 1830, 85th Cong., 2d Sess. 8

(1958) (Appendix, p. 5a). This problem of federal jurisdiction over workmen's compensation suits also exists in other states (*Id.*, at 34, Appendix, p. 10a).

Besides court congestion, Congress was also concerned with the unfairness to the injured employees that results from the suits being tried in federal courts. Under the Texas law the venue on an appeal from the Board's award would be in the county where the injury occurred, normally near the residence of the employee. Because of the geographical size of Texas and the considerable distance between division points of the four federal district courts of Texas, the place of trial in the federal court may be a considerable distance from the employee's home. Tactically the injured employee is severely handicapped in presenting his claim to a federal court in a distant town, not only because of the added expense of counsel, but also because of the difficulty and expense of securing the attendance of expert medical witnesses. In addition the federal court docket in some of the districts in Texas is a year or more behind the state docket. The exercise of federal jurisdiction means that many injured employees will have to settle their claims for substantially less than their value would be in a state court judicial proceeding. Congress was aware of this in its statement:

> "Nearly all of the state statutes on workmen's compensation provide summary proceedings for the expeditions [sic] and inexpensive settlement of claims by injured workmen against the employer. The procedure provided in such state statutes is not, as a rule, applicable to procedure in Federal courts. When cases are removed to Federal court the State statutes, in many instances, are entirely nullified. For instance, some of these State statutes limit the venue to the place where the accident occurred or to the district of the work-

> man's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." Sen. Rep. No. 1830, 85th Cong., 2d Sess. 8-9 (1958).

The "luxury of a trial in Federal court" is specially significant when one considers the small settlements and judgments that result. In the Eastern District of Texas, where this case arose, in only 3 cases out of 815 disposed cases for the period July 1, 1956 to March 7, 1960, was the employee's recovery over $10,000. Of these 815 cases, in 755 cases the recovery was between $5,000 and $18.95; 567 cases between $3,000 and $18.95; and 190 cases between $1,000 and $18.95.[2]

The insurance companies are not blind to the effect of a trial in the federal court. And now, instead of removing, the insurance company merely outraces the injured employee to the courthouse door. In this case, the insurer gave notice of appeal and filed this suit the same day the Board's award was announced, April 30, 1959. Subsequently, on May 6, 1959, Petitioner filed his appeal from the compensation award in the State District Court in Orange County (Record, pp. 27-30). And although two in personam suits can proceed concurrently as noted by the court below (Record, p. 46, n. 4), the Respondent has filed a plea in abatement in the Petitioner's state court action asking that it be

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[2] Data taken from "List of Workmen's Compensation Cases for Period July 1, 1956 through March 7, 1960." Report of Clerk, United States District Court for the Eastern District of Texas. Report is on file in the Clerk's Office, Tyler, Texas.

abated and dismissed. The plea in abatement is based upon the prior filing of Respondent's federal suit. (Plea is set out, Appendix, pp. 18a-20a).

Congress by prohibiting removal effectively closed the back door to the federal courthouse; the Fifth Circuit by manipulating the amount in controversy has opened the front door.

Without this manipulation practically every one of these suits by the *insurer* could *not* be brought in the federal court. By applying the federal test as to jurisdictional amount to suits brought by the insurer, thus limiting the amount in controversy to the amount of the award (all that is invoked by the insurer's cause of action) this result will be achieved. The maximum award under the Texas compensation law is $14,035.00 (401 weeks at $35.00 a week). In the vast majority of instances, the Industrial Accident Board's award is substantially below $10,000. The average award for the years 1957-1959 is less than $1,000.[3] Thus, under the decision below, the insurer circumvents the removal prohibition by racing into the federal court with the jurisdictional amount based not upon his cause of action

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[3] Report of the Industrial Accident Board of Texas for the Fiscal Year Ending August 31, 1957:

Number of Claims Handled—63,934
Number of Awards Issued—8,467
Amount of Board's Awards—$6,590,438.01
Notices of All Cases Disposed of in Court—4,996

Id. for the Fiscal Year Ending August 31, 1958:

Number of Claims Handled—60,755
Number of Awards Issued—8,192
Amount of Board's Awards—$7,407,287.32
Notices of All Cases Disposed of in Court—5,112

Id. for the Fiscal Year Ending August 31, 1959:

Number of Claims Handled—60,060
Number of Awards Issued—7,888
Amount of Board's Awards—$6,898,025.82
Notices of All Cases Disposed of in Court—4,620

(as required by the federal test) but upon the unasserted potential counterclaim of the employee (as permitted under the state test).

Respondent has contended that if Congress had not intended federal courts to take jurisdiction of the instant suit it would have prohibited original jurisdiction as well as removal jurisdiction over workmen's compensation suits. With deference, this argument is fallacious. Congress as a matter of policy expressly decided that the *employee* should have a *choice* of a state forum or a federal forum and that the employee's choice of a state forum was not to be defeated through removal.

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act —that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court." Sen. Rep. No. 1830, 85th Cong., 2nd Sess. 9 (1958).

III.

Federal Jurisdictional Amount Is Not Presented by Respondent-Insurer's Suit to Set Aside Administrative Board's $1,050.00 Award.

a. *Amount in controversy governed by plaintiff's cause of action*

The Respondent-insurer brought this action to set aside the $1,050.00 Industrial Accident Board's award in favor of Petitioner. Jurisdictional amount is claimed because the Petitioner-employee sought $14,035.00 before the Board. Consider the relationship between the Board's award and the amount the employee claimed before the Board. If the insurer appeals, the employee may counterclaim for any amount up to the sum claimed before the Board. If the insurer appeals and the employee does not present a claim before the court, the Board's award is set aside. If neither party appeals, the Board's award becomes final and binding upon the insurer and the employee. Texas Civil Statutes (Vernon, 1948, Supp. 1958) Art. 8307, §5 (Appendix, p. 13a); *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 330 (1938) (see discussion of case under heading IIa, *supra*). The instant suit by Respondent-insurer *is not* to obtain a declaratory judgment that insurer is not obligated to pay $14,035.00; and certainly the suit *is not* to obtain installment payments as was involved in *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464. The Respondent-insurer's cause of action *is* to set aside the $1,050.00 award; nothing more. It is the Petitioner-employee who was injured and who has the right to seek compensation. The insurer's right is to set aside the Board's award.

Petitioner's basic position is that the amount in controversy under 28 U.S.C. §1332 is to be determined from the claim for relief, *i.e.*, the cause of action, asserted by plaintiff's (Respondent's) complaint.[4] This proposition is both fully in accord with the amount requirement purpose to limit federal jurisdiction and with the decisions of this Court. As early as 1798 this Court, in *Wilson* v. *Daniel*, 3 Dall. 401, 407-8, stated (per Ellsworth, C.J.):

> "It was not intended to say, that on every such question of jurisdiction, the demand of the plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for 100£, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at 10,000£. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion, to which, from the nature of the action, we can resort in settling the question of jurisdiction.
>
> "The proposition then is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

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[4] By analogy, compare the rule that a federal question must appear in the complaint well pleaded and not by anticipation of defendant's answer. *Louisville & Nashville Railroad* v. *Mottley*, 211 U.S. 149.

This aspect of the *Wilson* case was cited with approval in *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182. In *Vance* v. *W. A. Vandercook Co.* (No. 2), 170 U.S. 468, 481, this Court again held that the amount in controversy was that, and only that, asserted under the plaintiff's cause of action. Accord: *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121. See Dobie on Federal Jurisdiction and Procedure, §56 (1928).

Here, for a cause of action Respondent alleges that the Petitioner is not entitled to $1,050.00.[5] But, for the amount in controversy Respondent (plaintiff) relies not upon his asserted cause of action to set aside the award. As previously discussed in reference to *Booth* v. *Texas Employers' Ins. Ass'n*, 132 Tex. 237, 123 S.W.2d 322 (1938), the Respondent relies upon the maximum potential counterclaim that *could* be asserted by the Petitioner.[6] The Fifth Circuit

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[5] "Plaintiff would further show that said order, and award of the Industrial Accident Board of the State of Texas, above described made and entered on April 30, 1959, in this claim and the claim itself of the defendant herein is wholly unsupported by evidence or law and should be in all things vacated, set aside and held for naught." Respondent's Complaint, paragraph 6. Record p. 3.

"Wherefore, premises considered, plaintiff prays that defendant be cited to appear and answer this complaint and that upon final hearing hereof said award be in all things vacated, set aside, voided and declared to be of no further force and effect, plaintiff further prays that defendant herein take nothing of and from this plaintiff and that plaintiff recover its costs and be given such other and further relief as it may be justly entitled to receive." Respondent's Complaint, paragraph 8, Record p. 4.

[6] "The amount in controversy as claimed by defendant and which defendant claimed and claims before the Industrial Accident Board is in excess of the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said defendant before the Industrial Accident Board claiming to have been totally and permanently injured in said above described accident in the course and scope of his employment, which if true, would be a sum equal to Fourteen Thousand Thirty-five Dollars ($14,035.00)." Respondent's Complaint, paragraph 4, Record p. 3.

erred in determining jurisdictional amount by taking the defendant's viewpoint in the prior administrative hearing that culminated in the $1,050.00 award instead of the plaintiff's viewpoint in this case.

One of the leading cases involving jurisdictional amount is *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283. This case warrants special consideration because the Fifth Circuit and Respondent, on one hand, believe the case supports the Fifth Circuit's holding; however the district court below, the district court in *National Surety Corp.* v. *Chamberlain,* 171 F. Supp. 591 (N.D. Tex. 1959), and the Petitioner, on the other hand, believe the case supports the district court's holding. The difficulty comes in applying the "legal certainty" phrase of the *St. Paul* case which is applicable when the plaintiff's claim is for *unliquidated damages.* The phrase does not refer to the possibility that a suit may involve the jurisdictional amount because of the defendant's answer for the *St. Paul* case requires that the amount in controversy be based upon the plaintiff's claim:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 290.

It is respectfully submitted that the able opinion in *National Surety Corp.* v. *Chamberlain,* which involves an

identical fact situation, reaches the correct result. Professor Moore states: "With deference, we feel that analysis of the Court of Appeals in *Horton* was unsound, and that the proper ruling was that of the district court in *Chamberlain*." 1 Moore's Federal Practice, paragraph 0.93 [5.-3], p. 859 (2d ed. 1960). See also 1 Moore's Federal Practice 511 (1938); Forrester, Cases and Materials on Federal Jurisdiction and Procedure 214 (1950).

b. *Collateral and anticipated effect of Respondent-insurer's cause of action to set aside $1,050.00 award may not be considered.*

This principle is a corollary of the rule previously discussed that the amount in controversy must be determined from the plaintiff's cause of action and not from a different cause of action possessed by the defendant. The instant suit to set aside a $1,050.00 award was held to involve the amount in controversy only by considering the suit's collateral and anticipated effect. (See paragraph 4 of Respondent's complaint, Record, p. 3, quoted N. 6, *supra*.) As discussed previously, the reason for saying that the amount in controversy exists in this suit is based upon two factors: (1) if the employee does not come and seek to uphold the award, it will be set aside; (2) if the employee does seek more than the amount of the award, the most he can counterclaim for is the amount he sought before the Board. (See *Booth* v. *Texas Employers Ins. Ass'n*, 132 Tex. 237, 123 S.W.2d 322 (1938); Texas Civil Statutes (Vernon, 1948, Supp. 1958), Art. 8307 Sec. 5, Appendix, pp. 13a-15a).

If the Fifth Circuit's view be the rule, the plaintiff with a claim below the jurisdictional amount could always come into federal court so long as a potential compulsory counterclaim existed that *could* involve more than the jurisdictional amount. A plaintiff should not be able to add the value of these potential counterclaims simply because the principle

of *res judicata* would bar defendant from later asserting them if they are not raised in the instant suit. To hold as the court below is to give consideration to the collateral effect of the potential judgment, violating one of the cardinal rules applicable to the computation of the amount in controversy. *Elgin* v. *Marshall*, 106 U.S. 578 (effect of *res judicata* may not be considered in determining jurisdictional amount); *Healy* v. *Ratta*, 292 U.S. 263 (object of the suit does not embrace matter collateral or incidental to issue raised by pleading). Judge Dobie stated the rule as follows:

> "The amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the rights which he in good faith asserts in his pleading that sets forth operative facts which constitute his cause of action. A counterclaim should play no part in the determination of the amount in controversy. And only the value of right directly in issue in the suit in question, not the collateral effect of the judgment can be considered in making up the necessary jurisdictional amount." Dobie on Federal Jurisdiction and Procedure, §56 (1928).

IV.

Jurisdictional Amount Is Not Satisfied Where Plaintiff's Claim Is Below The Jurisdictional Amount Because Defendant, Expressly Subject To A Prior Motion To Dismiss For Want Of Jurisdiction, Conditionally Files A Compulsory Counterclaim In Excess Of The Jurisdictional Amount.

Although the court below stated that another reason for not refusing jurisdiction was that the jurisdictional amount is satisfied when a compulsory counterclaim is brought in an amount in excess of the jurisdictional minimum, it is not entirely clear that this is an alternative holding. For

the Fifth Circuit opinion, written by a learned judge of great experience, never once mentions the salient fact that the counterclaim in this case was filed expressly subject to the motion to dismiss[7] and so treated by the district court[8] (and so argued by Petitioner in his brief and in his oral argument to the court below). And the authority cited by the Fifth Circuit does not appear to be applicable to this case where the claim was filed subject to the motion to dismiss.[9]

Federal Rule of Civil Procedure 12(b) states: "No defense or obligation is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."[10] Moreover it is not uncommon for prudent counsel to file a compulsory counterclaim subject to a

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[7] Defendant's [Petitioner's] Cross-Complaint paragraph 1, Record p. 14: ". . . cross-plaintiff files this his cross-action [counterclaim] subject to his motion to dismiss and without waiving same."

[8] District Court's Memorandum Decision, Record p. 38: "Since Defendant's' [Petitioner's] cross-claim was filed subject to his motion to dismiss Defendant's cross-claim will likewise be dismissed."

[9] *Home Life Insurance Co.* v. *Sipp*, 11 F. 2d 474 (3rd Cir. 1926) (was reversed for want of jurisdictional amount); *Roberts Min. & Mdl. Co.* v. *Schrader*, 95 F. 2d 522, 523 (9th Cir., 1938) ("Schrader took no advantage of this jurisdictional defect, but filed an answer . . ."); *Henderson* v. *Maryland*, 62 F. 2d 107 (5th Cir. 1933) (amendment by plaintiff to claim $3,661.20 waived any error in denial of remand of previous $2,916 claim; court found $2,916 claim asserted to prevent removal); *Isenberg* v. *Biddle*, 125 F. 2d 741 (D.C. Cir., 1941) (defendant, U.S. Attorney-General, *wanted* to litigate counterclaim in federal court and independent federal jurisdiction existed over counterclaim); *Switzer Bros.* v. *Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir., 1958) (does not involve jurisdictional amount).

[10] See *In re Mount Forest Fur Farms of America, Inc.*, 122 F. 2d 232, 245 (6th Cir. 1941); *Diaz-Montero* v. *Brownell*, 217 F. 2d 737, 738 (9th Cir. 1954); *W. H. Elliott & Sons Co.* v. *Nuodex Products Co.*, 243 F. 2d 116, 118-119 (1st Cir. 1957). *But Cf. Hook & Ackerman* v. *Hirsh*, 98 F. Supp. 477, 478 (D.D.C. 1951). In general see 2 Moore's Federal Practice, paragraph 12.12 (2d ed. 1948).

prior motion to dismiss. In the condemnation case of *Chicago R.I. & P. RR.* v. *Stude*, 346 U.S. 574, the railroad-condemnor brought suit in federal district court asking that the damages be affixed at not more than $10,000 instead of the $23,888.60 awarded by the Commissioners. The defendant landowner filed, subject to his motion to dismiss, a compulsory counterclaim asking damages for $32,000. *Chicago R.I. & P. RR.* v. *Stude*, October Term 1953, No. 209, Transcript of Record, p. 12, Brief of Petitioner, p. 6 (*Stude* case is discussed p. 25, *infra*).

Finally, it is the defendant, not the plaintiff, who has the right to file and to voluntarily dismiss the counterclaim. The trial judge dismissed the complaint for want of federal jurisdiction and then the "subject to" counterclaim was dismissed. Federal Rule of Civil Procedure 41(c) expressly provides for the dismissal of counterclaims by defendants.

Professor Moore in commenting on the counterclaim aspect of this case has stated:

> "Moreover, the existence of a counterclaim for the total amount originally claimed before the Board should not change the outcome. As pointed out *infra*, the amount of a counterclaim should not be added to the original claim in determining the jurisdictional amount. If such amount is not present in the original claim, the action is subject to dismissal. And while the amount of a compulsory counterclaim may itself exceed the jurisdictional amount, and the counterclaim should not be dismissed if the defendant who was compelled to come into federal court wishes the action there tried, in this case the defendant moved to dismiss. He should have the option to return to state court, when plaintiff has not brought a claim that fulfills the jurisdictional amount requirement. And this will accord with the

policy of Congress, as the district court pointed out in *Chamberlain*, without doing violence to any jurisdictional principles." 1 Moore's Federal Practice, paragraph 0.93 [5.-3], pp. 859-860 (2d ed. 1960).

With all deference to the Fifth Circuit, to uphold jurisdictional amount on the basis of a defendant's counterclaim filed subject to motion to dismiss is unnecessarily advocating a quicksand theory of federal jurisdiction contrary to the very spirit of the Rules of Procedure and the Congressional purpose to limit federal jurisdiction.

V.

The Proceeding By Respondent-Insurer To Set Aside State Administrative Agency's Award In Favor Of Petitioner-Employee Is Not An Original Action Within Jurisdiction Of A Federal District Court.

Petitioner's basic position is that the amount in controversy is not presented under the Respondent-insurer's cause of action to set aside the Board's $1,050.00 award. The point now under discussion is significant because the original civil action requirement of 28 U.S.C. §1332 precludes the Respondent from asserting that the Petitioner-employee's claim before the Board constitutes the amount in controversy. The amount claimed before the Board could only be the amount in controversy here if this action was a true appellate review and continuation of the administrative proceedings. Or conversely, if this suit is an original civil action, the amount in controversy must be determined by the plaintiff's (Respondent's) cause of action.

Although this Court has not previously considered the Texas Workmen's Compensation law, it has considered

analogous various condemnation cases involving appeals from State administrative boards. As District Judge Whittaker stated in *Collins* v. *Public Service Comm'n*, 129 F. Supp. 722, 726 W.D. Mo. 1955): "The analogy between this type of proceeding [condemnation] and the Workmen's Compensation cases is, I think, so close as to be indistinguishable." This similarily was noted by Judge Estes and applied, under an identical fact situation as here involved, to the Texas Workmen's Compensation law in *National Surety Corp.* v. *Chamberlain*, 171 F. Supp. 591 (N.D. Tex. 1959).

In *Chicago R.I. & P. RR.* v. *Stude*, 346 U.S. 574, the sheriff upon application of the railroad to condemn land had appointed a commission of six resident freeholders that assessed damage at $23,888.60. The railroad "appealed" to the federal district court alleging the $23,888.60 award to be excessive and asking that damages be fixed at not more than $10,000. This Court after noting that "the action is brought not by the person injured, namely, the landowner, but by the railroad that inflicted the damage", held that the suit was not an original action. In the case at bar, as in the *Stude* case, the appeal was *de novo*. The *Stude* case would not apply here if this action had been brought by the injured employee. In this case the court below rejected the application of the *Stude* case: "The second ground ['(2) that the Texas statutory compensation suit must be analyzed to efforts to have state condemnation proceedings reviewed in the federal courts'] is even less substantial. The result of wishful thinking and whistling in the dark, it presents nothing more than shadow boxing, the putting up of a straw man to smack him down" (Record, p. 47 [p. 46]).

In the *Stude* case it would have been possible for this Court to place the decision on other grounds. The ratio

decidendi of the holding was that the railroad phrased its complaint in terms of an appellate review and that the federal district courts have no appellate jurisdiction. See Note, 64 Yale L.J. 600, 603 (1955). In the instant case Respondent by his complaint asked for a review of the administrative proceedings (Respondent's Complaint, paragraphs 4, 6, 7, Record, pp. 3-4). Respondent for purposes of satisfying the federal jurisdiction amount requirement can not urge that the instant suit is a continuation of the administrative proceeding; and then for purposes of satisfying the original civil action requirement contend that this is a wholly separate and original proceeding.

Moreover, as was true in the *Stude* case, Respondent here is not the injured party. There would seem to be no basis for a *tort feasor* (*i.e.*, the true defendant) to bring an original action in federal district court to obtain a declaration of nonliability other than pursuant to the federal declaratory judgment act. 28 U.S.C. §§2201, 2202. This Court in *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274, held that absent a declaratory judgment statute federal courts have no authority to give declaratory judgments. The present suit was not brought under the federal declaratory judgment act and, indeed, if it had been, the fact that the Petitioner has a state court action pending (Record, pp. 27-30) would in itself be sufficient grounds to refuse to entertain the declaratory judgment proceeding.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the suit ordered dismissed for want of federal jurisdiction.

JOE H. TONAHILL
P. O. Box 179
Jasper, Texas

WILLIAM VANDERCREEK
3315 Daniels
Dallas 5, Texas
Attorneys for Petitioner

FLOYD W. ADDINGTON
Of Counsel

December, 1960

APPENDIX

APPENDIX A—JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES: PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER WORKMEN'S COMPENSATION LAWS.

Sen. Rep. No. 1830, 85th Cong., 2d Sess.; 2 U.S. Code Cong. & Admr. News 3099 (1958) (in relevant part) .. 1a

APPENDIX B—WORKMEN'S COMPENSATION LAW.

Texas Civil Statutes (Vernon, 1948; Supp. 1958) Art. 8307, 8307a, 8307b, (in relevant part) 11a

APPENDIX C—PLEA IN ABATEMENT, EMMET HORTON v. LIBERTY MUTUAL INSURANCE COMPANY, No. 12,365 IN THE DISTRICT COURT OF ORANGE COUNTY, TEXAS 18a

APPENDIX A

Calendar No. 1865

85TH CONGRESS
2d Session SENATE REPORT No. 1830

JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES: PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER STATE WORKMEN'S COMPENSATION LAWS

JULY 11 (legislative day, JULY 10), 1958—Ordered to be printed

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Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 11102]

The Committee on the Judiciary, to which was referred the bill (H. R. 11102) amending the jurisdiction of district courts in civil actions with regard to the amount in controversy and diversity of citizenship, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to increase the amount in controversy in cases of a Federal question and of diversity of citizenship from the existing $3,000 to $10,000. It further provides, for purposes of diversity of citizenship jurisdiction, that a corporation is to be deemed a citizen of the State by which it has been incorporated and

of the State where it has its principal place of business. The bill further provides that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

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JURISDICTIONAL AMOUNT

The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000.

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PROHIBITING REMOVAL OF WORKMEN'S COMPENSATION CASES TO FEDERAL COURTS

It is well settled that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. [3 How.] 235), the Supreme Court stated the rule as follows:

"* * * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * *" (p. 244).

See also *Chicot County Drainage* v. *Bank* (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* ((1911), 140 S.W. 579, 100 Ark. 467).

The jurisdiction of Federal courts based on diversity of citizenship goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789. This grant of jurisdiction by the Congress to the Federal courts in diversity of citizenship cases was to guard against possible discrimination by State courts in favor of resident over nonresident litigants. This authority to resort to the Federal rather than to the State courts in diversity cases has led to abuse. The great increase in diversity cases in recent years has placed great burdens on the Federal judiciary; as was well stated by Mr. Justice Frankfurter in *Lumbermen's Mutual Casualty Company* v. *Florence R. Elbert* (348 U.S. 48, 60, 61).

"Since diversity jurisdiction is increasingly the biggest source of the civil business of the district courts, the continuance of that jurisdiction will necessarily involve inflation of the number of the district judges. This in turn will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the Federal courts. Madison believed that Congress would return to the State courts judicial power entrusted to the Federal courts 'when they find the tribunals of the States established on a good footing.' 3 Elliot's Debates 536 (1891). Can it fairly be said that State tribunals are not now established on a sufficiently 'good footing' to adjudicate State litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the State tribunals not yet be trusted to mete out justice to nonresident litigants; should resident litigants not be compelled to trust their own State tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming State tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid State courts?"

In a number of States the workload of the Federal courts has greatly increased because of the removal of workmen's compensation cases from the State courts to the Federal courts. Statistics prepared by the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, graphically display the effect of the workmen's compensation suits removed from State to Federal courts in Texas and New Mexico. These studies for the fiscal year 1957 are as follows:

Workmen's compensation suits commenced in the United States district courts in Texas during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
Northern district:				
Insurance company:				
Plaintiff	10	10	—	—
Defendant	795	435	350	10
Eastern district:				
Insurance company:				
Plaintiff	8	7	1	—
Defendant	392	177	213	2
Southern district:				
Insurance company:				
Plaintiff	5	3	1	1
Defendant	678	204	472	2
Western district:				
Insurance company:				
Plaintiff	5	5	—	—
Defendant	254	141	111	2
Total for State:				
Insurance company:				
Plaintiff	28	25	2	1
Defendant	2,119	957	1,146	16
Total	2,147	982	1,148	17

Workmen's compensation suits commenced in the United States district court in New Mexico during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
1st quarter	12	3	9	—
2d quarter	20	2	18	—
3d quarter	23	2	20	1
4th quarter	13	4	8	1
Total	68	11	55	2

Workmen's compensation cases arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases.

The removal of workmen's compensation cases from State courts to the Federal courts adds to the already overburdened docket of the Federal courts, the congestion in some of which is now most deplorable.

Nearly all of the State statutes on workmen's compensation provide summary proceedings for the expeditious and inexpensive settlement of claims by injured workmen against the employer. The procedure provided in such State statutes is not, as a rule, applicable to procedure in Federal courts. When cases are removed to the Federal court the State statutes, in many instances, are entirely nullified. For instance, some of these State statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the work-

man settles his claim because he cannot afford the luxury of a trial in Federal court.

Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act—that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court.

Section 5 of the bill was added as an amendment on the floor of the House. The Committee on the Judiciary, at its meeting on June 30, had reported a bill, S. 1615, to the Senate. The language of the Senate bill is identical to the language inserted as an amendment on the floor of the House, that is, as now contained in section 5 of this bill.

The Judicial Conference of the United States has recognized the need for this legislation by approving S. 1615 as an appropriate limitation of the diversity jurisdiction.

The Department of Justice, in reporting to this committee on the merits of S. 1615, recommends favorable consideration of this legislation as an aid in meeting the problem of court congestion.

* * * * * * * *

SESSION OF MARCH 1957

Chief Judge Biggs reported that the Committee had considered at length various proposals for restricting or modifying the present diversity jurisdiction of the United States courts. The Committee found that the situation in respect to diversity jurisdiction is an extremely complex one and was not prepared to deal at length with the subject until further statistics have been procured from the

Administrative Office and the matter has been considered further.

Previously the Committee had recommended that the jurisdictional amount be placed at $15,000, exclusive of interest and costs, but it was now of the view that it should modify its former recommendation and adhere to that expressed by the Committee on Jurisdiction and Venue of which Chief Judge Parker was Chairman. Accordingly, it unanimously resolved that the Committee recommend to the Judicial Conference that the jurisdictional amount in diversity cases be increased to $10,000, exclusive of interest and costs, and that every effort be made to procure the enactment of such legislation by the present Congress.

The Committee also was of the view that the recommendation made to the Conference by the Committee on Jurisdiction and Venue, that a corporation be deemed to be a citizen not only of the State of its incorporation but also of the State in which it has its principal place of business, should be renewed at the present Congress.

These recommendations were adopted by the Conference and the Committee was authorized to continue its study of jurisdiction in diversity of citizenship cases.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., April 28, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1615) to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws.

The bill would amend section 1445 of title 28, United States Code, by adding a new category of actions which may not be removed under the section from State to Federal district courts. The bill would provide that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

It is well established that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. 235), the Supreme Court stated the rule as follows:

"* * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * * *" (p. 244). See also *Chicot County Drainage* v. *Bank*, (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* (1911), 140 S.W. 579, 100 Ark. 467).

As an aid in meeting the problem of court congestion, the Department of Justice favors the legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

LAWRENCE E. WALSH,
Deputy Attorney General.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D. C., March 7, 1958.

Hon. JAMES D. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: The Judicial Conference of the United States, at its session in September 1957, considered the proposal contained in S. 1615, now pending before your committee, to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws. At that time, the committees of the Conference on Court Administration and Supporting Personnel, in a joint report, stated that the United States district courts in Texas, Alabama, and New Mexico receive a substantial number of such cases by removal and that the district courts of Louisiana receive some such cases.

I am authorized to inform you that the Judicial Conference of the United States, upon the recommendation of the committees, approved S. 1615 as an appropriate limitation of the diversity jurisdiction.

Sincerely yours,

WARREN OLNEY III, *Director.*

* * * * * * *

APPENDIX B

Workmen's Compensation Law

Texas Civil Statutes (Vernon, 1948; Supp. 1958)
Art. 8307, 8307a, 8307b (in relevant part).

Art. 8307.

Rules; Physical Examination; Suspension of Compensation; Procedure and Powers

Sec. 4. The board may make rules not inconsistent with this law for carrying out and enforcing its provisions, and may require any employee claiming to have sustained injury to submit himself for examination before such board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicans, a chiropractor or chiropractors authorized to practice under the laws of this State. If the employee or the association requests, he or it shall be entitled to have a physician or physicians, chiropractor or chiropractors of his or its owns selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment, chiropractic service or other remedial treatment recognized by the State, as is reasonably essential to promote his recovery, the board may in its discretion order or direct the association to reduce or suspend the compensation of any such injured employee. No compensation shall be reduced or suspended under the terms of this section without reasonable notice to the employee and an opportunity to be heard.

When authorized by the board, the association shall have the privilege of having any injured employee examined by a physician or physicians, chiropractor or chiropractors of

its own selection, at reasonable times, at a place or places suitable to the condition of the injured employee and convenient and accessible to him. The association shall pay for such examination and the reasonable expense incident to the injured employee in submitting thereto. The injured employee shall have the privilege to have a physician or chiropractor of his own selection present to participate in such examination. Provided, when such examination is directed by the board at the request of the Association, the Association shall pay the fee of the physician or chiropractor selected by the employee, such fee to be fixed by the Board.

Process and procedure shall be as summary as may be under this law. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute, punish for contempt in the same manner and to the same extent as a District Court may do, and to bar persons guilty of unethical or fraudulent conduct from practicing before the Board. All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of this law.

Notice of Injury; Claim for Compensation

Sec. 4a. Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six months after the occurrence of the injury or the first distinct manifestation of an occupational disease; or, in case of death of the employee or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity. For good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the board.

Determination of Questions; Suit to Set Aside Final Ruling and Decision; Revocation of Association's License

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of this law, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty (20) days after the rendition of said final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provision of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court upon

request free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissible in evidence in any court in this State upon trial of such claim therein pending and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the association, it shall at once comply with such final ruling and decision; and failing to do so the board shall certify the fact to the Commissioner of Insurance and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such association to do business in Texas.

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the court, having jurisdiction of a claim against the association for the cost or expense of items of medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances furnished to an employee under circumstances creating a liability therefor on the part of the association under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the association for all such cost or expense which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with respect to such items, but shall not be res judicata of the obligation of the association to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing juris-

diction in the same case to render successive awards to determine the liability of the association for the cost or expense of any such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which said employee may be entitled; provided, each such successive award of the Board shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law.

Rights and Remedies

Sec. 5a. In all cases where the board shall make a final order, ruling or decision as provided in the preceding section and against the association, and the association shall fail and refuse to obey or comply with the same and shall fail or refuse to bring suit to set the same aside as in said section is provided, then in that event, the claimant in addition to the rights and remedies given him and the board in said section may bring suit where the injury occurred, upon said order, ruling or decision. If he secures a judgment sustaining such order, ruling or decision in whole or in part, he shall also be entitled to recover the further sum of twelve per cent as damages upon the amount of compensation so recovered in said judgment, together with a reasonable attorney's fee for the prosecution and collection of such claim.

Where the board has made an award against an association requiring the payment to an injured employee or his beneficiaries of any weekly or monthly payments, under the terms of this law, and such association should thereafter fail or refuse, without justifiable cause, to continue to make said payments promptly as they mature, then the said injured employee or his beneficiaries, in case of his death, shall have the right to mature the entire claim and to institute suit thereon to collect the full amount thereof, together with twelve per cent penalties and attorney's

fees, as herein provided for. Suit may be brought under the provisions of this section, either in the county where the accident occurred, or in any county where the claimants reside, or where one or more of such claimants may have his place of residence at the time of the institution of the suit.

COMPUTATION OF TIME FOR NOTICE OR SUIT

Sec. 5b. In computing the twenty (20) days for the filing with the Board notices of unwillingness to abide by the final ruling and decision of the Board, and likewise in computing the twenty (20) days to institute a suit to set aside the final ruling of said Board, if the last day is a legal holiday or is Sunday, then, and in such case, such last day shall not be counted, and the time shall be and the same is hereby extended so as to include the next succeeding business day; but this provision shall not extend to or include any cases now filed or now pending in the trial court or on appeal from the trial court; the rights of the parties in such suits now pending or on appeal from the trial courts shall be determined by the law existing prior to the passage of this Act.

Art. 8307a. Suit to set aside decision by Industrial Accident Board; transfer to county where injury occurred.

Any interested party who is not willing and does not consent to abide by the final ruling and decision of the Industrial Accident Board shall, in the manner and within the time provided by Section 5 of Article 8307, Revised Civil Statutes of 1925, file notice with said Board, and bring suit in the county where the injury occurred to set aside said final ruling and decision; however, in the event such suit is brought in any county other than the county where the injury occurred, the court in which same is filed shall, upon ascertaining that it does not have jurisdiction to render judgment upon the merits, transfer the case to the proper court in the county where the injury occurred. Provided, however, that notice of said transfer shall be given to the parties and said suit when filed in the court to which the transfer is made, shall be considered for all purposes, the same as if originally filed in said court.

Art. 8307b. Presumptions on appeal from Board; denial by verified pleadings.

In the trial of any case appealed to the court from the board the following, if plead, shall be presumed to be true as plead and have been done and filed in legal time and manner, unless denied by verified pleadings:

(1) Notice of injury;

(2) Claim for compensation;

(3) Award of the board;

(4) Notice of intention not to abide by the award of the board;

(5) Filing of suit to set aside the award.

Such denial may be made in original or amended pleadings; but if in amended pleadings such must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them must be proved.

APPENDIX C

RESPONDENT'S PLEA IN ABATEMENT TO PETITIONER'S STATE COURT ACTION

IN THE DISTRICT COURT OF ORANGE COUNTY, TEXAS

12,365

EMMET HORTON

vs.

LIBERTY MUTUAL INSURANCE COMPANY

DEFENDANT'S ORIGINAL PLEA IN ABATEMENT

COMES NOW Liberty Mutual Insurance Company, defendant in the above entitled and numbered cause, and files this its plea in abatement and for cause therefor would respectfully show unto the court the following:

1.

This is a workmen's compensation suit brought in this court on May 6, 1959 by Emmet Horton seeking to recover total permanent disability for injuries allegedly sustained while in the course of his employment for United States Steel Corporation, American Bridge Division in Orange County, Texas, on or about October 8, 1957.

2.

On April 30, 1959, the Industrial Accident Board of the State of Texas, made, entered and rendered its final award and decree in the plaintiff's claim, and on April 30, 1959, the defendant Liberty Mutual Insurance Company filed its notice of dissatisfaction with the Industrial Accident Board, and of its intention to appeal the award of said Board to a court of competent jurisdiction. Subsequent

to the filing of such notice of dissatisfaction by Liberty Mutual Insurance Company defendant herein, it did as plaintiff, in Civil Action No. 4162 in the United States District Court, Eastern District of Texas, Beaumont Division, file its suit to set aside the award of the Industrial Accident Board, such suit being filed on April 30, 1959. Summons was issued and the complaint and summons was served upon Emmet Horton, defendant in the Federal Court suit, and the plaintiff herein, on May 5, 1959.

2.

Defendant Liberty Mutual Insurance Company would respectfully show unto the court, Civil Action 4162, presently pending in the United States District Court, Eastern District of Texas, by and between the same parties, concerning the same claim made by Emmet Horton arising out of the same accident, made the basis of this suit, was prior in time and filed in a court of competent jurisdiction, and that this suit should be in all things abated and dismissed by the reason of such prior pending litigation by and between the same parties involving the precise subject matter as the instant suit.

WHEREFORE, premises considered, defendant prays that upon hearing of its plea in abatement that said plea be in all things sustained and that the above entitled and numbered suit be for the reasons herein stated, dismissed and abated and for such other and further relief as it may be justly entitled to receive.

ORGAIN, BELL & TUCKER
First Federal Savings Building
Beaumont, Texas
By /s/ HOWELL COBB
Howell Cobb
Attorney for Defendant

THE STATE OF TEXAS)
COUNTY OF JEFFERSON)

BEFORE ME, the undersigned authority on this day personally appeared Howell Cobb, who being duly sworn, did depose and say: My name is Howell Cobb. I am attorney of record for Liberty Mutual Insurance Company, and authorized to make this affidavit. I have read and am familiar with the facts stated in the foregoing plea in abatement and upon oath say that they are in all things true and correct.

/s/ HOWELL COBB
Howell Cobb

SWORN TO AND SUBSCRIBED before me this 28th day of May A. D., 1959, to certify which witness my hand and seal of office.

/s/ [Illegible]
Notary Public in and for
Jefferson County, Texas